not invoke a plain error exception, but instead engaged in plenary review, and Respondents could not demonstrate plain error even if such review were permissible under *Unitherm*. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (reversal under plain error standard requires showing that there is an error that is "clear" or "obvious" and "affects substantial rights"). The evidence showed that the Side Letter Agreement and Heads of Agreement were not intended to constitute a single integrated contract: they were negotiated separately; neither states any intention to form a single contract; and the Heads of Agreement includes terms enforceable between the individual artists and TVT alone. Pet. App. 37a; *id.* at 51a-52a. Accordingly, there is no basis for disturbing the jury's verdict on tortious interference based on Respondents' "single contract" theory.[7] The copyright verdict also could not have been reversed as plain error. The alleged error was not apparent to anyone, even Respondents; it was so obscure the Circuit had to raise it *sua sponte*. Nor was it error; the license was not supported by consideration and was thus revocable at will. *See* Petition at 18.[8]

III. THE SECOND CIRCUIT'S DECISION FLATLY CONTRAVENES RULE 50 AND THIS COURT'S DECISION IN *UNITHERM*

Rule 50(a)(2) requires that a motion for JMOL "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Thus,

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n.8, which assessed sufficiency of the evidence based on purported authority to "'inquire whether the record reflects an absolute dearth of evidentiary support for the jury's verdict'") (citation omitted).

[7] Even though Respondents did not argue the "single contract" theory at trial, the record shows that the jury rejected it. *See* Petition at 17-18 (discussing instruction requiring jury to find for IDJ on tortious interference if it found that IDJ was a party to the Heads of Agreement).

[8] IDJ's reliance on *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997), is also misplaced. The court there unremarkably held that the Court of Appeals may address an issue if the appellee waived its objection to the appellant's failure to comply with Rule 50.

IDJ's assertion that a party may generically request JMOL with respect to each claim, IDJ Opp. at 20, is flat wrong. Rule 50(b) also describes the post-verdict motion as a renewal of the pre-verdict motion; accordingly, a Rule 50(b) motion may only include grounds asserted in a Rule 50(a) motion. Respondents cannot evade Rule 50(a) by pointing to their Rule 50(b) motion because they were not entitled to rely in their Rule 50(b) motion on any theory omitted from their Rule 50(a) motion.

Respondents' interpretation of this Court's Rule 50 cases would render them toothless. IDJ claims that "*Unitherm* has no applicability here, because in that case *the respondent filed no post-verdict motions as to liability whatsoever*," IDJ Opp. at 3, but simply ignores that the Court expressly held that "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." 126 S. Ct. at 984 n.1. Likewise, Respondents make no effort to address the *Unitherm* Court's statement that it was rejecting the dissent's theory because that theory would allow the Courts of Appeals to "examine the sufficiency of the evidence regardless of whether the appellant had filed a Rule 50(a) motion in the district court...." *Id.* at 986 n.4.

Nothing in the cases from this Court cited by Respondents undermines this holding of *Unitherm*. The prior Rule 50 cases did focus principally on Rule 50(b), but also emphasized that Rule 50 must be strictly observed. *See Johnson v. N.Y., New Haven, & Hartford R.R. Co.*, 344 U.S. 48, 52 (1952) ("Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts."); *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 572 (1948) (requiring defendant to renew under Rule 50(b) even though verdict was directed pursuant to plaintiff's Rule 50(a) motion); *Cone v. W.Va. Pulp & Paper Co.*, 330 U.S. 212, 217-18 (1947) (holding that Rule 50 must be strictly enforced because it protects Seventh Amendment right to trial by jury).

Moreover, *Singleton v. Wulff*, 428 U.S. 106 (1976) – which IDJ contends "makes clear that" strict compliance with Rule 50 is not necessary, IDJ Opp. at 17 – did not involve either a jury trial or Rule 50. Respondents also neglect to mention that in *Singleton* this Court actually reversed because it did "not agree ... with the action of the Court of Appeals in proceeding beyond the issue of standing to a resolution of the merits of the case." *Singleton*, 428 U.S. at 119. It is thus most often cited not for Respondents' claimed rule excepting waiver, but rather for the contrary proposition that the Courts of Appeals should *not* decide issues, like those relied upon here by the Second Circuit, which were not properly presented below.

CONCLUSION

For the reasons set forth above and in the Petition, *certiorari* should be granted and the decision below reversed.[9] Alternatively, the Court should grant the petition, summarily vacate the decision below, and remand it to the Second Circuit with instructions to reconsider its decision in light of *Unitherm*.

Respectfully submitted,

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[9] Cohen's argument that review "would pose acute problems of unfairness arising from retroactive application of a new rule of law," Cohen Opp. at 12, is inconsistent with *Unitherm* itself, which reversed a decision applying settled Tenth Circuit law excusing noncompliance with Rule 50. 126 S. Ct. at 984.

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